

For P.M. Release
June 20, 1963

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" Can a Vigorous Federal Trade Commission Enforcement
Policy be Pro-Business?"

An Address

by

Honorable A. Leon Higginbotham, Jr.
Commissioner of the Federal Trade Commission

Before

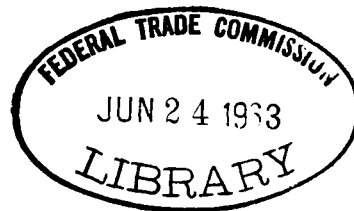
Ohio State Bar Association
- and -

The Ohio Manufacturers Association's
Seventh Annual Institute on Corporate Legal
Problems

Arlington Arms Motel

Columbus, Ohio

At 7:00 P.M.
June 20, 1963



CAN A VIGOROUS FEDERAL TRADE COMMISSION
ENFORCEMENT POLICY BE PRO-BUSINESS?

I AM INDEED HONORED TO BE PRESENT WITH YOU
AT THE ANNUAL DINNER MEETING OF THE SEVENTH
INSTITUTE ON CORPORATE LEGAL PROBLEMS.

I HAVE HEARD SOME CRITICS SUGGEST THAT THE
FEDERAL TRADE COMMISSION LOOKS ASKANCE AT ALL MERGERS.
FOR THE RECORD, LET ME MAKE IT INDUBITABLY CLEAR THAT
I COMMEND YOU ON THE MERGER THIS EVENING OF THE OHIO
BAR ASSOCIATION AND THE OHIO MANUFACTURERS ASSOCIATION.

EVEN UNDER THE MOST STRINGENT TESTS, THIS JOINT
VENTURE BRINGING TOGETHER LEADING REPRESENTATIVES OF
INDUSTRY AND THE CORPORATE BAR WOULD NOT VIOLATE
SECTION 7 OF THE CLAYTON ACT. WHEN THE TOP ECHELONS OF
COMMERCE CAN SHARE THEIR EXPERIENCES WITH LEADERS OF
THE LEGAL PROFESSION, THE REASONABLE PROBABILITY IS
THAT COMPETITION WILL BE ENHANCED, NOT LESSENER.

I WELCOME THIS OPPORTUNITY TO MAKE FRIENDLY
EYE-BALL TO EYE-BALL CONTACT. HERE I CAN STATE MY
PERSONAL VIEWS, AND HOPEFULLY THE VIEW OF MY DISTINGUISHED
COLLEAGUES, AT ONE MEETING WHERE BOTH INDUSTRIALISTS AND
ATTORNEYS ARE PRESENT.

THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN SOMEWHAT RELAXED BY RECENT COURT DECISIONS.^{1/} AND THUS WORD HAS REACHED SIXTH AND PENNSYLVANIA, N.W., IN WASHINGTON, D. C., THAT SOME INDUSTRIALISTS FEEL THAT THE FEDERAL TRADE COMMISSION IS DRIVING THE COUNTRY TO CERTAIN ECONOMIC DOOM. MOREOVER, I HEAR THAT SOME LAWYERS, HAVING RECENTLY LOST A CASE BEFORE THE COMMISSION, ASSURE THEIR CLIENTS THAT VICTORY WAS IN THEIR GRASP BUT FOR THE IGNORAMUSES AT THE COMMISSION. I DO NOT WISH TO SUGGEST THAT THESE COMMENTS REFLECT MANAGEMENT OF THE NEWS. BUT I AM PARTICULARLY GRATEFUL FOR THIS OPPORTUNITY TO ELIMINATE THE MIDDLEMAN, AND TO BY-PASS THE USUAL CHANNELS OF COMMUNICATION IN THIS CONTINUING EXCHANGE OF VIEWS BETWEEN BUSINESS AND GOVERNMENT. WHILE I MAY NEVER BE ABLE TO CHANGE THOSE VIEWS SHARED BY SOME INDUSTRIALISTS OR LAWYERS, I NEVERTHELESS WELCOME THE OPPORTUNITY TO TRY.

PERHAPS THE CAPTION OF MY SPEECH IS FLAVORED WITH MADISON AVENUE BRINKMANSHIP. PERHAPS THE QUESTION "CAN A VIGOROUS FEDERAL TRADE COMMISSION ENFORCEMENT POLICY BE PRO-BUSINESS?" MIGHT IMPLY THE SUBTLE USE OF SEMANTICS TO MAKE PALATABLE AND PLEASANT AN INSTITUTION WHICH IS LETHAL TO YOUR SUCCESS. SUCH IS NOT MY INTENT. LET ME ASSURE YOU THAT I AM NOT TURNING ON THE "SOFT SELL".

PURSUANT TO SECTION 5, THE FEDERAL TRADE COMMISSION MUST PROHIBIT DECEPTIVE OR MISLEADING ADVERTISING. AND SO THAT MY ANSWER TO THE QUESTION POSED IN THE TITLE OF THIS SPEECH WILL NOT BE SUBJECT TO A CEASE AND DESIST ORDER AND POSSIBLE CIVIL PENALTIES, I HASTEN TO MAKE AFFIRMATIVE DISCLOSURES. PERHAPS AS JUSTICE HOLMES ONCE SUGGESTED, HE WHO PHRASES THE QUESTION AND DEFINES THE TERMS CONTROLS THE ANSWER. AS I USE THE TERM PRO-BUSINESS, I DO NOT IMPLY THAT PRO-BUSINESS DECISIONS ARE NECESSARILY ANTI-PUBLIC INTEREST OR ANTI-LABOR OR ANTI-CONSUMER. TO PARAPHRASE THE LANGUAGE USED BY A FORMER INDUSTRIALIST AND SECRETARY OF DEFENSE, AND TO PLACE IT IN A DIFFERENT CONTEXT, I RESPECTFULLY SUBMIT THAT IF THE FEDERAL TRADE COMMISSION MAKES WISE DECISIONS "THAT WHICH IS GOOD FOR THE FEDERAL TRADE COMMISSION WILL BE GOOD FOR THE COUNTRY AND THAT WHICH IS GOOD FOR THE FEDERAL TRADE COMMISSION SHOULD BE GOOD FOR BUSINESS".

IMMEDIATELY AFTER ANNOUNCEMENT OF MY APPOINTMENT TO THE COMMISSION LAST SEPTEMBER, I WAS BARRAGED BY MANY WELL MEANING INDIVIDUALS WHO THOUGHT IT ESSENTIAL THAT I BECOME INSTANTLY FAMILIAR WITH MANY ALLEGED

OBJECTIVE ANALYSES BY INNUMERABLE PERSONS, WHOSE PARAMOUNT CONCERN WAS SOLELY THE PUBLIC INTEREST, THE NATIONAL WELFARE AND REASONABLE AND RESPONSIBLE ECONOMIC FREEDOM. I STARTED TO READ MANY OF THE ALLEGED CLASSICS ON THE HISTORY OF THE COMMISSION AND THE ALLEGED OBJECTIVE APPRAISALS OF ITS PERFORMANCE SINCE 1914. AFTER A FEW MONTHS, I WAS CONVINCED THAT THE LITERATURE ON THE COMMISSION, BOTH PRO AND CON, ESTABLISHES THE MONUMENTAL ADVANTAGE OF UNRESTRAINED FREEDOM OF SPEECH. TO PARAPHRASE MR. JUSTICE HOLMES, SOME OF THE AUTHORS HAVE FELT THAT THE DECISIONS OF THE COMMISSION CONSTITUTE A "CLEAR AND PRESENT DANGER"^{2/} TO THE NATIONAL WELFARE; WHILE OTHERS HAVE SUGGESTED THAT THE COMMISSION IS THE LAST AND SOLE BASTION FOR PRESERVATION OF ECONOMIC FREEDOM.

IT IS INTRIGUING TO NOTE THAT SUCH POLAR DIALOGUE IS NOT SOLELY OF RECENT ORIGIN. DURING THE 1914 DEBATES ON THE BILLS PROPOSING CREATION OF THE FEDERAL TRADE COMMISSION, SENATOR BRANDEGEE DECLARED THAT SUCH A COMMISSION WOULD BE^{3/} A "SCOURGE AND DOSE OF SPANISH FLY

AND CAYENNE PEPPER". THESE MEN, HE SAID, WOULD BE "BENEVOLENT DESPOTS". THEY WOULD "FIX THINGS TO RUN SMOOTHLY ACCORDING TO THEIR NOTIONS OF WHAT MAY BE 'ETHICAL OR NOT ANTI-SOCIAL' OR FOR THE 'PUBLIC INTEREST' OR ANY OF THOSE 'GOO-GOO' PHRASES. THIS IS A GOVERNMENT OF LAWS NOT MEN"^{4/}.

ACCORDING TO SENATOR REED, THE CREATION OF THE COMMISSION WOULD CONFER "ARBITRARY AND ALL EMBRACING POWER ... UPON A MERE BOARD OF MEN". IT WOULD "VIOLATE THE PROVISIONS OF THE CONSTITUTION WHICH INSURE TO EVERY CITIZEN ... THE RIGHT TO BE GOVERNED BY THE RULES OF LAW ... AND NOT UNDER THE DECREES OF INDIVIDUALS OR BOARD"^{5/}. RAISING MEMORIES OF 1775 HE VOWED "THAT, SIR, IS A MONARCHY NOT A REPUBLIC"^{6/}.

GAZING UPON THE OTHER SIDE OF "OBJECTIVE" ANALYSIS, I DISCOVERED THAT SENATOR NEWLANDS FELT THAT: "...IMMENSE BENEFIT WILL COME FROM MAKING UNLAWFUL UNFAIR COMPETITION; THAT IT WILL PROTECT THE PYGMIES AGAINST THE GIANTS OF BUSINESS AND THAT IT WILL DO MORE TO OPEN THE LINES OF COMMERCE THAN ALL OTHER LEGISLATION THAT WE HAVE UPON THE STATUTE BOOKS UPON THE SUBJECT"^{7/}.

WHEN IN 1936, THE ROBINSON-PATMAN ACT WAS PASSED AND ITS ENFORCEMENT ENTRUSTED MAINLY TO THE COMMISSION, THE HOUSE AND SENATE DEBATES WERE SIMILARLY DEVOID OF UNANIMITY. SPEAKING OF THE PROPOSED STATUTE, REPRESENTATIVE CELLER SAID:

THE COURTS WILL HAVE THE DEVIL'S OWN JOB TO UNRAVEL THE TANGLE...YOU HAVE THE HERCULEAN TASK TO MAKE IT YIELD SENSE.^{7a/}

THE ADVOCATES OF THIS BILL INCLUDE MANY INDEPENDENTS UNABLE TO MEET COMPETITION WHICH IS EASILY MET BY THEIR EFFICIENT FELLOW DEALERS... /THEY ARE/ ASKING FOR UNNATURAL RESTRAINTS UPON THEIR MOST EFFICIENT COMPETITION. THEY SEARCHED HIGH AND LOW WHEN THEY HAD THE NRA FOR WAYS AND MEANS TO THE SAME SELFISH END. THEY WANT NO RESTRAINTS ON THEMSELVES; THEY WANT THEM ONLY^{8/} APPLIED TO THE OTHER FELLOW...

THE LEGISLATION PROPOSED...STRIKES DIRECTLY AT THE PRIMARY INTEREST OF THE PUBLIC BUT DENIES CONSUMERS THE ASSURANCE OF OBTAINING THE BENEFITS OF THE LOWEST PRICES THE MOST EFFICIENT METHODS AND EQUIPMENT CAN BRING ABOUT UNDER FREE, BUT FAIR, COMPETITION."^{9/}

SPEAKING FERVENTLY FOR PASSAGE OF THE STATUTE, CONGRESSMAN PATMAN SUGGESTED:

THE DAY OF THE INDEPENDENT MERCHANT IS GONE

UNLESS SOMETHING IS DONE AND DONE QUICKLY.
HE CANNOT POSSIBLY SURVIVE UNDER THAT SYSTEM.
SO WE HAVE REACHED THE CROSS ROADS; WE MUST
EITHER TURN THE FOOD AND GROCERY BUSINESS OF
THIS COUNTRY ... OVER TO A FEW CORPORATE
CHAINS, OR WE HAVE GOT TO PASS LAWS THAT WILL
GIVE THE PEOPLE, WHO BUILT THIS COUNTRY IN
TIME OF PEACE AND WHO SAVED IT IN TIME OF WAR,
AN OPPORTUNITY TO EXIST^{10/}..."

CONGRESSMAN PATMAN CONCLUDED THAT HIS BILL SIMPLY
WOULD "FORCE ALL CHISELERS AND CHEATERS TO ADOPT GOLDEN
RULE POLICIES" AND SOUGHT ONLY TO MAKE "A POLICY OF LIVE
AND LET LIVE, AND COMPEL THE GOLDEN RULE IN BUSINESS."^{11/}

ONE DISTINGUISHED COMMENTATOR ON THE STATUTE HAS
SUMMARIZED THE HISTORY OF ITS PASSAGE AS FOLLOWS:

"IN THE END, THE ROBINSON-PATMAN COMPROMISE
OF 1936 WAS THE OFFSPRING OF A MIXED MARRIAGE
BETWEEN ANTITRUST AND NRA, BORN WITH A LEGAL
SPLIT PERSONALITY"^{12/}.

THE DEBATE HAS NOT SUBSIDED SINCE PASSAGE OF THE
ROBINSON-PATMAN ACT. ONE AUTHOR STILL CATEGORIZES THE
STATUTE AS ONE "HAPHAZARDLY CONCEIVED AND HOPELESSLY
DRAFTED" AND LAMENTS THAT "THOSE WHO UNHAPPILY ATTEMPT TO
ADVISE ON OR TO LITIGATE ISSUES UNDER THIS ACT ARE CON-
STANTLY FRUSTRATED BY THE OBDURACY OF THE COMMISSION IN

REJECTING EITHER LOGICAL ARGUMENT OR DETAILED ECONOMIC ANALYSIS, AND BY SOME OF THE WEIRD RESULTS REACHED BY THE COURTS IN APPLYING THE STATUTE."^{13/} A DECADE AGO, IN A REPLY ARTICLE WHICH THEY CAPTIONED "ANTITRUST POLICIES AND THE NEW ATTACK ON THE FEDERAL TRADE COMMISSION" SENATOR PAUL H. DOUGLAS AND ROBERT A. WALLACE DECLARED:

"WE INSIST THAT THE FEDERAL TRADE COMMISSION'S ENFORCEMENT OF THE LAWS RESTRAINING UNFAIR METHODS OF COMPETITION AND HARMFUL PRICE DISCRIMINATION OUGHT NOT BE JUNKED. RATHER, WE BELIEVE THAT THEY SHOULD BE STRONGLY ENFORCED AND, WHERE NEED BE, STRENGTHENED."^{14/}

THUS UPON MY APPOINTMENT ON SEPTEMBER 25, 1962, I BECAME THE BENEFICIARY OF THESE PROLIX, ALLEGEDLY OBJECTIVE POLAR VIEWS ON THE FEDERAL TRADE COMMISSION, AND STILL I HAVE THE TEMERITY TO BE DELIGHTED TO DISCUSS THIS ISSUE WITH YOU.

IN CITING THESE POLAR VIEWS, I NEITHER WANT NOR SEEK SYMPATHY; FOR I AM FAMILIAR WITH THE FORTITUDE REQUIRED OF LAWYERS. AS PROFESSOR BERLE EMPHASIZES,

"ALL LAWYERS ARE SOMEWHAT SUSPECT. A SPANISH CONQUISTADOR-GOVERNOR EARLY IMploRED THE KING OF SPAIN TO SEND NO LAWYERS AT ALL

TO HIS NEW TERRITORY: 'THEY ARE ALL DEVILS'.
A HALF-CENTURY LATER SHAKESPEARE IN HENRY VI
MADE JACK CADE AGREE TO 'KILL ALL LAWYERS'
WHILE PLATO HAD EARLIER ASSERTED THAT THE
LAWYER'S SOUL IS 'SMALL AND UNRIGHTEOUS!'. "^{15/}

HAVING PREVIOUSLY BEEN INVOLVED IN CIVIL RIGHTS
LITIGATION - A FIELD WHICH I'VE BEEN TOLD STILL IS NOT
TOTALLY CALM TODAY I EARLY DEVELOPED THE HIDE OF A
RHINOCEROS. TO ACT WITH CALMNESS AND JUDGMENT, I
LEARNED THAT ONE COULD NOT LET VERBAL DARTS HAVE LETHAL
AFFECT.

AS THOMAS JEFFERSON SAID WHEN OUR COUNTRY WAS IN
ITS BIRTH THROES, "A WISE AND FRUGAL GOVERNMENT IS ONE
WHICH SHALL RESTRAIN MEN FROM INJURING ONE ANOTHER, SHALL
LEAVE THEM OTHERWISE FREE TO REGULATE THEIR OWN PURSUITS
OF INDUSTRY AND IMPROVEMENT." ^{16/} THE FEDERAL TRADE COM-
MISSION BELIEVES IN THIS PRECEPT, AND IF I MAY POINT OUT
TO THIS AUDIENCE - THE NATIONAL ASSOCIATION OF MANUFACTURERS
AGREES. IT HAS STATED: "BUSINESS MEN BELIEVE IN COMPETI-
TION BECAUSE THEY RECOGNIZE THAT THE ALTERNATIVE TO IT IS
COMPREHENSIVE GOVERNMENT DIRECTION WHICH WOULD BE FAR
WORSE IN ITS CONSEQUENCES." ^{17/}

IT IS OBVIOUS THAT THE MAINTENANCE OF COMPETITION CONTRIBUTES TO THE PRESERVATION OF DEMOCRACY AND LIBERTY. AND IT IS NO ACCIDENT THAT THOSE NATIONS WHICH HAVE VIGOROUS COMPETITIVE ECONOMIC SYSTEMS HAVE DEMONSTRATED THE MOST IMMUNITY TO FASCISM AND COMMUNISM. SPECIFICALLY THEN WHAT ARE THE CHIEF BENEFITS OF A COMPETITIVE ENTERPRISE SYSTEM? ECONOMISTS SUMMARIZE THESE BENEFITS IN TERMS OF WELFARE, EFFICIENCY AND PROGRESS. IT IS SAID THAT OUR SYSTEM MAXIMIZES CONSUMER WELFARE BY GEARING PRODUCTION TO DEMAND, BY PROVIDING A VARIETY OF PRODUCTS AND BY THE CREATION OF NEW PRODUCTS. THE BUSINESSMEN OF THIS COUNTRY HAVE FLOURISHED UNDER SUCH A SYSTEM. COMPETITION MAKES FOR EFFICIENCY BECAUSE SIMPLE SELF INTEREST COMPELS US TO MINIMIZE PRODUCTION COSTS. THIS IS A CONSERVATIVE TECHNIQUE. AND A COMPETITIVE SYSTEM IS ALSO PROGRESSIVE BECAUSE IT REWARDS ENTREPRENEURS WHO DEVELOP AND UTILIZE TECHNOLOGIES FOR PRODUCING BETTER PRODUCTS. THE FEDERAL TRADE COMMISSION IS PRO-BUSINESS BECAUSE IT BELIEVES, AS YOU DO, IN A SYSTEM MAKING MERIT THE ONLY CRITERION FOR SUCCESS IN THE MARKET PLACE.

OBVIOUSLY OUR SYSTEM IS NOT FREE FROM FAULT; BUT IT HAS MAXIMIZED CONSUMER WELFARE; IT HAS PRODUCED ECONOMIC EFFICIENCY AND TECHNOLOGICAL PROCESS. COMPETITION IS A DELICATE FLOWER. AND SINCE 1914, THE FEDERAL TRADE COMMISSION HAS BEEN TENDING THE GARDEN IN WHICH THIS FLOWER OF COMPETITION HAS GROWN. WE HAVE PROTECTED THE CONSUMER

AGAINST THE ARBITRARY AND CAPRICIOUS EXERCISE OF MONOPOLISTIC POWER. WE HAVE DEFENDED SMALLER FIRMS AGAINST THE PREDATORY TACTICS OF LARGER COMPETITORS. AND WE HAVE CALLED TO A HALT A VARIETY OF UNFAIR AND DECEPTIVE PRACTICES.

THUS, TO CALL THE STATUTES WHICH WE ADMINISTER ANTI-BUSINESS IS TO MISCONSTRUE THEIR PURPOSE. RATHER THAN HAVING SUCCESS DETERMINED BY FLAGRANT DECEPTION OR PURE MONOPOLY POWER, THE FEDERAL TRADE COMMISSION'S PURPOSE IS TO FURTHER COMPETITION, TO MAKE EACH MAN AND EACH FIRM STAND OR FALL ON THE INTRINSIC WORTH OF ITS OWN PRODUCT.

ALTHOUGH OTHER AGENCIES HAVE ANTITRUST RESPONSIBILITY, THE MAJOR TASK IS FULFILLED BY THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE. SINCE ITS ENACTMENT IN 1914, SECTION 5 OF THE COMMISSION'S ORGANIC ACT HAS BEEN AT THE HEART OF ITS EFFORTS TO PROTECT THE BUSINESSMAN AGAINST HIS MAURAUDING COMPETITOR.

SECTION 5 HAS ALSO BEEN THE SINEW AND THE MUSCLE EMPLOYED BY THE COMMISSION TO OUTLAW RESTRAINTS OF TRADE. ALLOW ME TO GIVE YOU A FEW EXAMPLES. IN THE HOLLAND FURNACE CASE, SALESMEN POSED AS FIRE INSPECTORS AND UNDER THESE AND OTHER GUISES, INDUCED HOME OWNERS, BY MEANS OF SCARE TACTICS TO PURCHASE HEATING EQUIPMENT. ENORMOUS FUTURE INJURY TO CONSUMERS AND COMPETITORS WAS PREVENTED BY THE COMMISSION'S ORDER. ^{18/} IN A CASE WHICH SOME REGARD AS A CLASSIC DEMONSTRATION OF REGULATORY REMEDIAL POWER, THE COMMISSION OBTAINED A STRONG PROHIBITION AGAINST ZONE

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THUS, TO CALL THE STATUTES WHICH WE ADMINISTER ANTI-BUSINESS IS TO MISCONSTRUE THEIR PURPOSE. RATHER THAN HAVING SUCCESS DETERMINED BY FLAGRANT DECEPTION OR PURE MONOPOLY POWER, THE FEDERAL TRADE COMMISSION'S PURPOSE IS TO FURTHER COMPETITION, TO MAKE EACH MAN AND EACH FIRM STAND OR FALL ON THE INTRINSIC WORTH OF ITS OWN PRODUCT.

ALTHOUGH OTHER AGENCIES HAVE ANTITRUST RESPONSIBILITY, THE MAJOR TASK IS FULFILLED BY THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE. SINCE ITS ENACTMENT IN 1914, SECTION 5 OF THE COMMISSION'S ORGANIC ACT HAS BEEN AT THE HEART OF ITS EFFORTS TO PROTECT THE BUSINESSMAN AGAINST HIS MAURAUDING COMPETITOR.

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DELIVERED PRICING BY THE NATIONAL LEAD COMPANY AND OTHERS. ONCE HAVING FOUND THE ZONE DELIVERED PRICING SYSTEM TO BE THE CORNERSTONE OF A CONSPIRACY, THE COMMISSION CONDITIONALLY BANNED ITS USE FOR FIVE YEARS. THUS WHEN IDENTICAL PRICES RESULTED FROM THE USE OF ZONE DELIVERED PRICING - SUCH ACTION WOULD BE SUBJECT TO THE COMMISSION'S ORDER EVEN IF ALL PRICES WERE INDIVIDUALLY DERIVED.^{19/}

BOTH CONSUMERS AND COMPETITORS ARE INJURED WHEN A FIRM ADVERTISES UNTRUTHFULLY THAT ITS PRODUCT CURES BALDNESS, TIRED BLOOD, RHEUMATISM, ARTHRITIS, OR OTHER AILMENTS. FALSE AND MISLEADING REPRESENTATIVES ALSO MAY SERIOUSLY UNDERMINE CONSUMERS' CONFIDENCE IN OUR ENTIRE ECONOMIC SYSTEM; DECEPTION MAKES A MOCKERY OF THE BASIC PREMISE OF OUR SYSTEM THAT INFORMED CONSUMER CHOICE ULTIMATELY GUIDES THE ALLOCATION OF ECONOMIC RESOURCES.

THE ADVERTISING WORLD ITSELF SEEMS TO SENSE THE NEED FOR HIGHER STANDARDS. AS THE SHRILLNESS OF COMMERCIALS INCREASE, AN IMMUNITY SEEMS TO SET IN, AND HARANGUES TO RUSH DOWN TO THE NEIGHBORHOOD GROCERS OR DRUGGISTS MAY FALL UPON CLOSED EYES AND DEAF EARS.^{20/}

ALTHOUGH SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT GIVES THE COMMISSION BROAD JURISDICTION TO PREVENT "UNFAIR METHODS OF COMPETITION" AND "UNFAIR OR DECEPTIVE ACTS OR PRACTICES", THE CONGRESS BY THE CLAYTON ACT OF 1914 CONSIDERABLY SUPPLEMENTED THAT AUTHORITY AND MADE IT SPECIFIC.

THE CONGRESS DECLARED PRICE DISCRIMINATION, EXCLUSIVE DEALING, STOCK ACQUISITIONS, AND INTERLOCKING DIRECTORATES UNLAWFUL WHENEVER THERE WAS A REASONABLE PROBABILITY THAT THESE PRACTICES SUBSTANTIALLY LESSENEED COMPETITION. THE INTENT OF THIS LEGISLATION WAS NOT TO ESTABLISH CONTROLS OVER BUSINESS; RATHER, IT WAS INTENDED TO IMPROVE THE COMPETITIVE MECHANISM BY WHICH BUSINESS REGULATES ITSELF.

IN THIS CONTEXT IT IS IMPORTANT TO NOTE THAT THE FEDERAL TRADE COMMISSION IS NOT A REGULATORY AGENCY IN THE USUAL SENSE. IT DOES NOT GRANT LICENSES TO OPERATE, PRESCRIBE ACCEPTABLE PRICES OR RATES OF RETURN, OR ENGAGE IN ANY OF THE OTHER ACTIVITIES ASSOCIATED WITH SOME REGULATORY AGENCIES.

THE FEDERAL TRADE COMMISSION IS CONCERNED PRIMARILY WITH THE RULES OF THE GAME. THIS APPROACH STRIVES TO GUARANTEE THAT THE COMPETITIVE GAME IS PLAYED IN A CERTAIN WAY; BUT IT DOES NOT CALL EACH PLAY IN THE GAME NOR DOES IT PRESCRIBE ITS OUTCOME. HENCE, IT IS ESSENTIALLY AN INDIRECT APPROACH. MOST IMPORTANTLY, IT DOES NOT DICTATE PERFORMANCE NORMS FOR BUSINESS, E.G., "FAIR" LEVELS OF PROFITS, ACCEPTABLE RATES OF TECHNOLOGICAL ADVANCE, OR THE QUALITY AND QUANTITY OF PRODUCTS TO BE PRODUCED.^{21/} WHEN THESE DECISIONS ARE MADE IN A COMPETITIVE ENVIRONMENT, THEY ARE BEST LEFT TO INDIVIDUAL BUSINESSMEN.

THIS IS THE TRUE GENIUS OF VIGOROUS ANTITRUST ENFORCEMENT. PARADOXICALLY, ALTHOUGH AN INDIVIDUAL BUSINESSMAN MAY VIEW PARTICULAR ENFORCEMENT ACTIONS AS BOTHERSOME AND UNNECESSARY MEDDLING INTO HIS AFFAIRS, SUCH "MEDDLING" PROTECTS AMERICAN BUSINESSMEN AGAINST MORE DIRECT AND CONTINUING INTERFERENCES INTO THEIR DAY-TO-DAY AFFAIRS. THIS IS WHY I SAY THAT VIGOROUS ANTI-TRUST ENFORCEMENT IS REALLY THE MOST PRO-BUSINESS OF ALL PUBLIC POLICIES.

LET US CONSIDER BRIEFLY SOME WAYS IN WHICH THE
ACT
CLAYTON/AFFECTS THE RULES OF THE COMPETITION GAME.

THE PROBLEM OF PRICE DISCRIMINATION

SINCE ITS AMENDMENT IN 1936, SECTION 2 OF THE CLAYTON ACT IS USUALLY REFERRED TO AS THE ROBINSON-PATMAN ACT. THE PURPOSE OF THE ACT IS TO INSURE THAT COMPETITION WILL NOT BE INJURED BECAUSE OF DISCRIMINATORY BEHAVIOR IN THE MARKET PLACE.

CHARGES FREQUENTLY LEVELLED AT THE ROBINSON-PATMAN ACT ARE THAT IT FAVORS SOFT RATHER THAN HARD COMPETITION AND THAT IT PROTECTS COMPETITORS RATHER THAN COMPETITION. BUT THE ISSUES INVOLVED ARE TOO COMPLEX TO BE ANSWERED BY SUCH CLICHES. THE SOFT VS. HARD COMPETITION ARGUMENT REMINDS ME OF THE ELEPHANT WHO SHOUTED, "EVERY MAN FOR HIMSELF", AS HE DANCED AMONG THE CHICKENS.

I NEED NOT RECITE TO YOU THE FACTS OF ECONOMIC LIFE. THAT THERE ARE WIDE DISPARITIES IN ECONOMIC POWER AMONG BUSINESS ENTERPRISES IS OBVIOUS TO EVERYONE FAMILIAR WITH THE STRUCTURE OF THE AMERICAN ECONOMY. WHILE DISPARATE SIZE IS NOT, PER SE ILLEGAL OR PER SE ECONOMICALLY UNDESIRABLE, IT MAY CREATE THE OPPORTUNITIES AND TEMPTATIONS TO USE THIS POWER IN ANTI-COMPETITIVE WAYS. THE ROBINSON-PATMAN ACT WAS DESIGNED TO CURB THE ABUSE OF SUCH ECONOMIC POWER. TO IMPLEMENT THE SLOGAN, "EVERY MAN FOR HIMSELF", IS TO INVITE THE VERY DESTRUCTION OF THE COMPETITIVE PROCESS.

VIGOROUS AND FAIR ENFORCEMENT OF THE ROBINSON-PATMAN ACT PROVISIONS IS CERTAINLY IN THE PUBLIC INTEREST AND IN THE INTEREST OF BUSINESS. IN THIS RAPIDLY GROWING AND CHANGING AMERICAN ECONOMY, VIGOROUS ENFORCEMENT IS IN THE LONG-RUN INTEREST OF LARGE BUSINESS FIRMS AS WELL AS SMALL ONES. MOST FIRMS, REGARDLESS OF THEIR PRESENT CIRCUMSTANCES, CANNOT BE CERTAIN OF THEIR RELATIVE POSITION IN A GIVEN MARKET FIVE OR TEN YEARS HENCE. THE PROVISIONS AGAINST PRICE DISCRIMINATION, DIRECT OR INDIRECT, MAY BE IRRITATING TODAY, BUT MOST WELCOME IN THE FUTURE. I FEEL THAT MUCH OF TODAY'S CRITICISM MIGHT BE MUTED IF MORE BUSINESSMEN WOULD CONSIDER THE POSSIBILITY THAT THEIR FIRM MAY AT SOME FUTURE TIME HAVE NEED OF THE PROTECTION AFFORDED BY THE STATUTE. AND ABOVE ALL ELSE, THE ACT IS DESIGNED TO GIVE THE SMALL AND MEDIUM SIZED BUSINESSES OF TODAY A FAIR CHANCE TO BECOME THE BIG BUSINESSES OF TOMORROW. THE DAY

THAT SMALL BUSINESS SURVIVES ONLY AT THE SUFFERANCE OF FIRMS WITH VAST ECONOMIC RESOURCES, WILL MARK THE DAY COMPETITION DIED IN AMERICA. THIS IS WHY VIGOROUS AND JUDICIOUS ENFORCEMENT OF THE ROBINSON-PATMAN ACT PLAYS SUCH A CENTRAL ROLE IN PRESERVING OUR COMPETITIVE SYSTEM.

THE MERGER PROHIBITION

IN WHAT ARE SOMETIMES TERMED "HIGHLY CONCENTRATED" INDUSTRIES MANY PERSONS HAVE ARGUED THAT THE FEDERAL TRADE COMMISSION ACT AND THE CLAYTON ACT ARE MERELY PALLIATIVE. THEY SAY THAT SUSPECTED MALIGNANCY IS NOT SUSCEPTIBLE TO THE PRESCRIPTION "2 ASPIRIN BEFORE RETIRING TO BED". CALL IN A SKILLED SURGEON AND DIAGNOSTICIAN, THEY URGE -ONE SWIFT OF SCALPEL, ONE WHOSE STEADY HANDS DO NOT TREMBLE AFTER THE INCISION REVEALS THE NECESSITY FOR DIVESTITURE.

FOR ALTHOUGH THE SHERMAN ACT OF 1890 WAS INTENDED TO CURB THE GROWTH OF BUSINESS COMBINATIONS, ITS PASSAGE HAD LITTLE OR NO EFFECT ON THE GREAT MERGER MOVEMENT THAT SUBSEQUENTLY OCCURRED AROUND THE TURN OF THE CENTURY. MANY OF TODAY'S BUSINESS BEHEMOTHS WERE PUT TOGETHER DURING THIS ERA.

TO THIS DAY, SOME INDUSTRIES ARE CONCENTRATED BECAUSE OF FAILURE TO CURB THIS FIRST GREAT MERGER MOVEMENT.

ALTHOUGH THE STRICT INTERPRETATION OF "COMMERCE"
ENUNCIATED IN 1895^{22/} WAS SUBSEQUENTLY REVERSED, OVER
3200 MERGERS AND CONSOLIDATIONS OCCURRED BETWEEN 1895
AND 1905.

THE CONGRESS MADE A SECOND ATTEMPT TO BAR THE
MERGER ROUTE TO MARKET POWER BY THE PASSAGE OF SECTION 7
OF THE CLAYTON ACT IN 1914. THE ENFORCEMENT OF THIS
STATUTE IS SHARED BY THE FEDERAL TRADE COMMISSION AND
THE DEPARTMENT OF JUSTICE. BUT THE FACT THAT THE
STATUTE PROHIBITED STOCK BUT NOT ASSET ACQUISITIONS MADE
IT AN INEFFECTIVE WEAPON AGAINST THE MERGER MOVEMENT OF
THE 1920'S. . AND DURING THAT DECADE OVER 6800 MERGERS
OCCURRED.

IN 1950 THE CONGRESS TRIED AGAIN. IT PASSED THE
CELLER-KEFAUVER AMENDMENT TO SECTION 7. THIS LAW CLOSED
THE ASSET LOOPHOLE IN THE ORIGINAL SECTION 7. THE NEW
SECTION 7 MAKES IT UNLAWFUL FOR A CORPORATION ENGAGED IN
COMMERCE TO ACQUIRE EITHER THE ASSETS OR STOCK OF ANOTHER
CORPORATION ENGAGED IN COMMERCE WHERE THE EFFECT OF SUCH
AN ACQUISITION MAY BE SUBSTANTIALLY TO LESSEN COMPETITION
OR TEND TO CREATE A MONOPOLY IN ANY LINE OF COMMERCE IN
ANY SECTION OF THE COUNTRY. THE LEGISLATIVE HISTORY OF
THE 1950 AMENDMENT MAKES IT CLEAR THAT CONGRESS NOT ONLY
INTENDED TO CLOSE THE OLD ACQUISITION OF ASSETS LOOPHOLE,
BUT ALSO WISHED TO STOP MERGERS BEFORE THEY REACH SHERMAN
ACT PROPORTIONS.

THE FEARS OF SOME AND THE HOPES OF OTHERS - THAT THE ACT WOULD SLOW MERGER ACTIVITY HAVE NOT BEEN REALIZED. IT IS IRONICAL THAT THE START OF THE CURRENT MERGER MOVEMENT COINCIDES APPROXIMATELY WITH THE PASSAGE OF THE CELLER-KEFAUVER ACT. ALTHOUGH COMPREHENSIVE STATISTICAL EVIDENCE IS LACKING ON THE CURRENT MERGER MOVEMENT, THE AVAILABLE EVIDENCE POINTS TO A MERGER TREND OF TREMENDOUS POTENTIAL IMPORTANCE FOR THE ECONOMY. THE COMMISSION'S RECORDS INDICATE THAT OVER 6,000 MANUFACTURING AND MINING MERGERS HAVE OCCURRED SINCE 1950^{23/}. SHOULD THE CURRENT MERGER MOVEMENT TRANSFORM FURTHER THE STRUCTURE OF OUR ECONOMY, IT MIGHT BRING ABOUT IRREVERSIBLE CHANGES WHICH COULD INFLUENCE ITS PERFORMANCE FOR DECADES TO COME. FROM MY OWN EXPERIENCE IN PRIVATE PRACTICE, I KNOW THE JET-PROPELLED, HEAD LONG PACE OF TODAY'S TOP CORPORATE PERSONNEL. DURING ONE EXHILARATING 36-HOUR DAY A HYPOTHETICAL OHIO BUSINESSMAN MIGHT CLOSE A DEAL BY TELEPHONE TO NEW YORK; NEGOTIATE FOR A FACTORY IN PUERTO RICO, AND SETTLE A LABOR CRISIS IN CALIFORNIA. AFTER THAT I AM SURE YOU WOULD HAVE NO DIFFICULTY TELLING YOUR WIVES THAT YOU WILL BE IN KARACHI, PAKISTAN, ON YOUR 25TH WEDDING ANNIVERSARY. I ONLY ASK YOU TO DO ONE THING FOR ME AND FOR YOURSELVES - WHILE YOU ARE AT THE AIRPORT - READ THE FIRST SUPREME COURT DECISION INTERPRETING "NEW" SECTION 7. AN UNDERSTANDING OF THE PHILOSOPHICAL BASES OF THAT DECISION MAY KEEP AN ALREADY HECTIC DAY FROM BECOMING A NIGHTMARE.

ALLOW ME TO SUMMARIZE BRIEFLY THE MAIN THRUST OF THAT DECISION INVOLVING THE BROWN SHOE COMPANY.^{24/}

ALTHOUGH THIS MERGER INVOLVED A VERTICAL FORECLOSURE OF LESS THAN TWO PERCENT OF THE RETAIL MARKET, THE COURT FOUND THAT IT VIOLATED THE ACT. WHILE THE SHOE INDUSTRY IS STILL COMPETITIVE BECAUSE IT IS COMPOSED OF A LARGE NUMBER OF MANUFACTURERS AND RETAILERS, THE COURT REASONED THAT THE "REMAINING VIGOR CANNOT IMMUNIZE A MERGER IF THE TREND IN THAT INDUSTRY IS TOWARD OLIGOPOLY"^{25/}. SPEAKING OF THE HORIZONTAL ASPECT OF THE CASE THE COURT REASONED, "IF A MERGER ACHIEVING FIVE PERCENT CONTROL WERE NOW APPROVED, WE MIGHT BE REQUIRED TO APPROVE FUTURE MERGER EFFORTS BY BROWN'S COMPETITORS SEEKING SIMILAR MARKET SHARES. THE OLIGOPOLY CONGRESS SOUGHT TO AVOID WOULD THEN BE FURTHERED AND IT WOULD BE DIFFICULT TO DISSOLVE THE COMBINATIONS PREVIOUSLY APPROVED".^{26/}

I SHALL NOT ATTEMPT TO GO INTO THE MANY LEGAL AND ECONOMIC NUANCES OF MERGER LAW, E.G., ITS APPLICATION TO VARIOUS TYPES OF CONGLOMERATE MERGERS, AND TO JOINT VENTURES. MANY OF THESE MATTERS ARE STILL TO BE RESOLVED BY THE COMMISSION AND THE COURTS. MY MAIN POINT IS THIS. INDUSTRIAL HISTORY HAS DEMONSTRATED THAT MERGERS CAN TRANSFORM THE STRUCTURE OF HIGHLY COMPETITIVE INDUSTRIES WITH A SWIFTNESS THAT IS IRREVERSIBLE. EVERYONE INTERESTED IN PRESERVING A FREE ECONOMY SHOULD TAKE A PERSONAL INTEREST IN THE FINAL OUTCOME OF THE CURRENT MERGER MOVEMENT. EACH MERGER,

SEEMINGLY NATURAL AND GOOD WHEN VIEWED IN ISOLATION - MAY
CREATE AN INDUSTRIAL MOSAIC NOT TO YOUR LIKING.

DIRECT ASSISTANCE TO BUSINESS

THE COMMISSION'S ROLE AS A REGULATORY AGENCY AND I
EMPHASIZE REGULATORY - REQUIRES IT TO DO MORE THAN ISSUE
SEEMINGLY DRACONIAN FIATS AGAINST IMPROPER CONDUCT. WE
ALSO HAVE THE OBLIGATION OF PREVENTIVE MEDICINE. A SUB-
STANTIAL AMOUNT OF OUR TIME IS DEVOTED TO DISTINGUISHING
BETWEEN HEALTHY AND HARMFUL COMMERCIAL NUTRIENTS FOR
BUSINESSMEN. WE WANT YOU TO EXERCISE YOUR COMPETITIVE
MUSCLES SO THAT BOTH GOVERNMENT AND BUSINESS MAY ASSURE
THE CONTINUED EXISTENCE OF A HEALTHY AND FLOURISHING
COMPETITION.

PRESIDENT WILSON STATED ON SEPTEMBER 2, 1916, IN
ACCEPTING RENOMINATION TO THE PRESIDENCY, "WE HAVE CREATED,
IN THE FEDERAL TRADE COMMISSION, A MEANS OF INQUIRY AND OF
ACCOMMODATION IN THE FIELD OF COMMERCE WHICH OUGHT BOTH TO
COORDINATE THE ENTERPRISES OF OUR TRADERS AND MANUFACTURERS
AND TO REMOVE THE BARRIERS OF MISUNDERSTANDING AND OF A TOO
TECHNICAL INTERPRETATION OF THE LAW....THE TRADE COMMISSION
SUBSTITUTES COUNSEL AND ACCOMMODATION FOR THE HARsher PRO-
CESSES OF LEGAL RESTRAINT.^{27/}..."

ONCE AWARE OF THESE SIGN POSTS, IT IS HOPED THAT
BUSINESSMEN WILL AVOID THE PRECIPICE POSTED "UNFAIR TO
COMPETITION".

TO ACHIEVE THIS GOAL, THE COMMISSION WITHIN THE LAST YEAR MATERIALLY BROADENED THE ADVISORY ASPECT OF ITS ACTIVITIES.

ON JUNE 1, 1962, THE COMMISSION ESTABLISHED A NEW PROCEDURE PROVIDING FOR TRADE REGULATION RULE PROCEEDINGS. THE RULES DEVELOPED AND ISSUED BY THE COMMISSION MAY COVER ALL APPLICATIONS OF A PARTICULAR STATUTORY PROVISION OR THEY MAY BE LIMITED TO PARTICULAR INDUSTRIES, PRODUCTS, GEOGRAPHIC MARKETS OR AREAS.

UNDER THIS NEW PROCEDURE THE COMMISSION WILL PROMULGATE RULES WHICH EXPRESS ITS EXPERIENCE AND JUDGMENT BASED UPON ITS KNOWLEDGE RELATING TO THE SUBSTANTIVE REQUIREMENTS OF THE STATUTES IT ADMINISTERS. OF COURSE, PRIOR TO THE DEVELOPMENT AND ISSUANCE OF SUCH RULES IT WOULD GIVE NOTICE AND HOLD HEARINGS ON ANY PROPOSED RULE. SUCH RULES WOULD BECOME EFFECTIVE UPON PUBLICATION IN THE FEDERAL REGISTER.

BUSINESSMEN HAVE LONG ASSERTED THEIR WILLINGNESS TO COMPLY WITH THE LAW. TELL US WHAT IT IS AND WE'LL OBEY IT, THEY SAY. IN FACT I HAVE HEARD THAT SOME OF YOU HAVE STORMED OUT OF YOUR ATTORNEY'S OFFICES MUTTERING THAT BANKRUPTCY AND PSYCHOANALYSIS WERE THE ONLY CHOICES AVAILABLE TO BUSINESSMEN COMPLYING WITH ALL THE LAWS ADMINISTERED BY THE COMMISSION. HOPEFULLY, THE TRADE REGULATION RULES WILL REMOVE SOME OF THIS ALLEGED NEUROTIC UNCERTAINTY. MOREOVER, THE COMMISSION'S POLICY ALSO PROVIDES FOR THE AMENDMENT, SUSPEN-

SION OR REPEAL OF ANY SUCH RULE WHERE MARKET CONDITIONS MAKE IT OBSOLETE.

THE FEDERAL TRADE COMMISSION'S BUREAU OF INDUSTRY GUIDANCE HAS PRESENTLY UNDER STUDY PROPOSALS FOR TRADE REGULATION PROCEEDINGS WHICH MAY AFFECT MORE THAN A DOZEN INDUSTRIES. SO THAT WE MAY MAKE INFORMED AND INTELLIGENT DECISIONS BEFORE PROMULGATING THESE RULES, WE ASK YOU TO GIVE US YOUR VIEWS. PURSUANT TO THE TRADE REGULATION RULE PROCEDURE ADOPTED LAST YEAR, THE COMMISSION HAS ANNOUNCED TWO HEARINGS ON PROPOSED RULES.

THESE INVOLVE THE MANUFACTURE AND SALE OF SEWING MACHINES AND SLEEPING BAGS.

ANOTHER NEW AND SIGNIFICANT INNOVATION HAS BEEN THE COMMISSION DECISION TO ISSUE "ADVISORY OPINIONS". WHILE WE HAVE HAD LIMITED EXPERIENCE WITH THIS PROCEDURE, WE BELIEVE THAT IT MAY BE ONE OF THE MORE IMPORTANT INNOVATIONS IN RECENT COMMISSION HISTORY.

FROM THE VERY MOMENT OF ITS CONCEPTION, SOME OF THE MEN WHO FATHERED THE FEDERAL TRADE COMMISSION ACT FELT -

"THERE OUGHT TO BE A WAY IN WHICH...MEN...COULD
SUBMIT THEIR PLAN TO THE GOVERNMENT AND AN INQUIRY
MADE AS TO THE LEGALITY OF SUCH A TRANSACTION, AND
IF THE GOVERNMENT WAS OF THE OPINION THAT COMPETI-
TION CONDITIONS WOULD NOT BE SUBSTANTIALLY IMPAIRED,
...THERE SHOULD BE AN END OF THAT PARTICULAR CONTRO-
VERSY FOR ALL TIME." ^{23/}

OF COURSE, AS IN EVERYTHING THAT THE FEDERAL TRADE COMMISSION TOUCHES, THERE WERE OPPOSING VIEWS. SOME HAVE THE MIDAS TOUCH, BUT ONE WAVE OF ANY WAND BY THE COMMISSION MAY SPARK A VERITABLE CONFLAGRATION OF INVECTIVE. ALMOST AS SOON AS THE COMMISSION PUT OUT ITS SIGN THAT IT WAS "OPEN FOR BUSINESS", NO LESS AN ADVOCATE THAN LOUIS D. BRANDEIS TOOK UP THE CUDGELS FOR THE OPPOSITION.

"...FROM THE BUSINESS STANDPOINT, IT IS DESIRABLE. IT WOULD BE A VERY CONVENIENT THING IF A MAN COULD COME BEFORE YOUR BODY AND SAY, 'HERE ARE THE FACTS; IS THIS RIGHT? CAN WE DO THIS, OR CAN WE DO THAT? IT SOUNDS VERY ALLURING. I BELIEVE IT TO BE ABSOLUTELY IMPOSSIBLE OF PROPER APPLICATION, AND FOR THIS COMMISSION, I THINK IT WOULD BE ONE OF THE MOST DANGEROUS POWERS THAT IT COULD POSSIBLY ASSUME.

* * *

"SO, I BELIEVE, THAT THIS COMMISSION COULD NOT DO ANYTHING WHICH IN ITS REAL ESSENCE, WOULD BE MORE HARMFUL TO BUSINESS, AND MORE DANGEROUS TO THE COMMISSION ITSELF, THAN TO EXERCISE THIS POWER, IF YOU HAVE IT. BUT I THINK IT IS PERFECTLY CLEAR THAT YOU HAVE NOT GOT IT."^{29/}

REQUESTS FOR ADVISORY OPINIONS HAVE INCLUDED QUESTIONS ON THE LEGALITY OF VARIOUS TYPES OF ADVERTISING PROGRAMS, NEW OR DIFFERENT MERCHANDISING METHODS, VARIOUS TYPES OF COOPERATION

AMONG FIRMS, THE USE OF COMMON SALES AGENCIES AND PROSPECTIVE MERGERS. TO DATE THE COMMISSION HAS RECEIVED MORE THAN 100 REQUESTS FOR ADVISORY OPINIONS UNDER THIS NEW PROCEDURE. WE ARE DELIGHTED THAT INCREASING NUMBERS OF AMERICAN BUSINESSMEN HAVE DECIDED TO OBTAIN OUR OPINION BEFORE EMBARKING ON SOME PROPOSED COURSE OF ACTION. AND, WHERE THE COMMISSION HAS FOUND IT AT ALL FEASIBLE A BINDING OPINION HAS BEEN RENDERED. WHERE INSUFFICIENT INFORMATION HAS BEEN PROVIDED, OR WHERE THE PROPOSED COURSE OF ACTION IS NOT COVERED BY LAWS ENFORCED BY THE FEDERAL TRADE COMMISSION, WE MUST REFUSE TO GIVE AN OPINION. CONFIDENTIAL TREATMENT IS ACCORDED TO BOTH THE REQUEST AND THE OPINION.

HERE THEN WE HAVE THREE EXAMPLES OF POSITIVE ACTION BY THE COMMISSION WHICH HAVE AS THEIR PURPOSE THE PROVISION OF DIRECT ASSISTANCE TO AMERICAN BUSINESS FIRMS.

THE DEVELOPMENT OF ECONOMIC EXPERTISE

CRITICS OF ANTITRUST ENFORCEMENT AGENCIES HAVE LEVIED THE CHARGE, AND RIGHTLY SO AT TIMES, THAT ENFORCEMENT USUALLY PROCEEDS ON A CASE-BY-CASE APPROACH WITHOUT REFERENCE TO THE SIZE, SHAPE OR CONTOURS OF THE ECONOMIC LANDSCAPE. THE COMMISSION IS COGNIZANT OF THE VALIDITY OF SUCH ACCUSATIONS. CONSEQUENTLY, WE FAVOR AN ACTIVE AND INTELLIGENT PROGRAM OF ECONOMIC STUDIES TO IMPROVE OUR KNOWLEDGE IN MANY VITAL AREAS.

SECTION 6 OF THE FEDERAL TRADE COMMISSION ACT GIVES THE COMMISSION THE POWER "TO GATHER AND COMPILE INFORMATION CONCERNING, AND TO INVESTIGATE FROM TIME TO TIME THE ORGANIZATION, BUSINESS CONDUCT, PRACTICES, AND MANAGEMENT OF ANY CORPORATION ENGAGED IN COMMERCE, EXCEPTING BANKS AND COMMON CARRIERS SUBJECT TO THE ACT TO REGULATE COMMERCE, AND ITS RELATION TO OTHER CORPORATIONS AND TO INDIVIDUALS, ASSOCIATIONS, AND PARTNERSHIPS". IN THE WORDS OF MR. JUSTICE JACKSON:

"...LAW ENFORCING AGENCIES HAVE A LEGITIMATE RIGHT TO SATISFY THEMSELVES THAT CORPORATE BEHAVIOR IS CONSISTENT WITH THE LAW AND THE PUBLIC INTEREST."^{30/}

WHETHER WE BE A FORCE FOR GOOD OR FOR EVIL WILL BE DETERMINED BY OUR KNOWLEDGE. WE CANNOT OPERATE IN A VACUUM. THIS THEME WAS ARTICULATED BY PRESIDENT THEODORE ROOSEVELT, ONE OF THE PIONEERS OF TRADE REGULATION. IN HIS FIRST ANNUAL MESSAGE, HE EMPHASIZED THE URGENT NEED FOR MORE ECONOMIC FACTS. AS HE PUT IT, "THE FIRST REQUISITE IS KNOWLEDGE, FULL AND COMPLETE ..."^{31/}

SINCE 1901, THE NEED FOR RELIABLE KNOWLEDGE HAS BEEN MAGNIFIED. OUR INDUSTRIAL EDIFICE HAS GROWN VASTLY MORE COMPLEX. TODAY, AMERICA'S LARGEST INDUSTRIAL COMPANY HAS ANNUAL SALES GREATER THAN ALL THE NATION'S MANUFACTURING CONCERNS IN 1899. IT IS IMPERATIVE, THEREFORE, THAT THE COMMISSION CONDUCT CONTINUING ECONOMIC INQUIRIES TO KEEP

ABREAST OF THE PROFOUND CHANGES OCCURRING IN OUR ECONOMY. AS A BANKER INQUIRES INTO THE CAPITAL, COLLATERAL AND CHARACTER OF PROSPECTIVE BORROWERS, SO MUST THE COMMISSION BE FAMILIAR WITH CURRENT DEVELOPMENTS IN THE ECONOMY BEFORE DECIDING WHERE TO ALLOCATE ITS LIMITED RESOURCES. TO MAKE SUCH DECISIONS WITHOUT RELEVANT ECONOMIC FACTS, MAY RESULT IN MISDIRECTED PUBLIC POLICY. THUS IN THE MOOG AND NIEHOFF CASES, THE SUPREME COURT SAID:

"...THE DECISION AS TO WHETHER OR NOT AN ORDER AGAINST ONE FIRM TO CEASE AND DESIST FROM ENGAGING IN ILLEGAL PRICE DISCRIMINATION SHOULD GO INTO EFFECT BEFORE OTHERS ARE SIMILARLY PROHIBITED DEPENDS ON A VARIETY OF FACTORS PECULIARLY WITHIN THE EXPERT UNDERSTANDING OF THE COMMISSION."^{32/}

RELIABLE ECONOMIC UNDERSTANDING AND KNOWLEDGE MUST BE THE CORNERSTONE OF ANY LEGAL STRUCTURE DESIGNED TO INSURE THE MAINTENANCE OF A COMPETITIVE ECONOMY. HOW BETTER CAN THE COMMISSION DEVELOP POLICIES AND PROMOTE PRACTICES BENEFICIAL TO COMPETITION AND BUSINESS?

THE FUTURE OF FREE ENTERPRISE IN A TROUBLED WORLD

NEVER BEFORE HAS SO MUCH BEEN ASKED OF OUR ECONOMIC SYSTEM. THE CUSTOMARY STRESSES AND STRAINS OF A GROWING INDUSTRIAL ECONOMY HAVE BEEN SHARPENED BY THE COLD WAR. THE STAKES ARE HIGH; BUT TO ABANDON HOPE IS TO LOSE EVERYTHING.

ARISING OUT OF THE WARM ASHES OF WORLD WAR I, WORLD WAR II AND KOREA IS MORE THAN A MILITARY CONFRONTATION. IN TODAY'S STRUGGLE, SOCIAL, ECONOMIC AND POLITICAL PERFORMANCE ARE CRITICAL. AND NEVER BEFORE HAS THE JUNCTION OF OUR SYSTEM BEEN SUBJECT TO CLOSER WORLD WIDE SCRUTINY.

ONE OF THE TRULY ENCOURAGING DEVELOPMENTS OF THE 1950'S WAS THE CHANGED ATTITUDE OF WESTERN EUROPE. BY PERMITTING AND ENCOURAGING FREE ENTERPRISE AS THE MOTIVE FORCE OF ECONOMIC PROGRESS, WESTERN EUROPE HAS DONE MORE THAN EMBRACE FREE ENTERPRISE AS A HABIT OF THOUGHT OR AS AN IDEOLOGICAL ALTERNATIVE TO COMMUNISM; IT HAS RECOGNIZED THAT COMPETITION MUST BE SAFEGUARDED SO THAT FREE ENTERPRISE MAY BE A DURABLE WAY OF ECONOMIC LIFE.

WESTERN EUROPE HAS TURNED ITS BACK ON ITS LONG HISTORY OF PRIVATE CARTELIZATION AND FLIRTATION WITH PUBLIC COLLECTIVIZATION. THE COMMON MARKET COUNTRIES HAVE WRITTEN ANTITRUST PROVISIONS INTO THE ROME TREATY. THEY HAVE RECOGNIZED THAT PRIVATE ENTERPRISE IS NOT ENOUGH; IT MUST ALSO BE COMPETITIVE ENTERPRISE.

OF LATE, THE ANTITRUST BREEZE HAS ALSO BEEN BLOWING MORE STRONGLY OVER THE BRITISH ISLES, LONG SO PROUD OF THEIR "PRACTICAL" APPROACH TO MATTERS OF COMPETITION AND MONOPOLY - AN APPROACH WHICH, IN PRACTICE, SO OFTEN SEEMED LESS AFRAID OF MONOPOLY THAN COMPETITION. IN A REMARKABLY CANDID TREATMENT OF THE MONOPOLY PROBLEM IN BRITAIN,

A COMMITTEE APPOINTED BY THE BRITISH CONSERVATIVE PARTY RECENTLY RECOMMENDED AN EXPANSION OF THAT COUNTRY'S ANTI-TRUST ACTIVITIES. THIS COMMITTEE CONCLUDED:

OUR OWN VIEW IS THAT THE BRITISH ECONOMY SINCE THE WAR HAS BEEN SUFFERING NOT FROM TOO MUCH BUT TOO LITTLE COMPETITION. THE TROUBLE WITH BRITISH INDUSTRY TODAY IS NOT THAT MANAGERMENTS ARE SO RUTHLESS IN THEIR DETERMINATION TO SCORE OVER THEIR COMPETITORS THAT ANY LESS IMMEDIATE OBJECTIVES, VALUES AND AMENITIES ARE FORGOTTEN; THE RISK IS RATHER THAT BOTH MANAGEMENT AND ORGANIZED LABOR SHOULD BECOME COMPLACENT AND, AS A RESULT, SLUGGISH AND INEFFICIENT. 33/

YES, THE FREE EUROPEAN NATIONS HAVE CHOSEN A COMPETITIVE ECONOMIC SYSTEM IN PREFERENCE TO A CONTROLLED ONE. AND THEY HAVE RECOGNIZED THAT THE FLOWER OF COMPETITION MUST NOT BE LEFT UNATTENDED. I THINK THEIR DECISION TO RELY ON THE INDIRECT ANTITRUST APPROACH TO PRESERVE COMPETITION NOT ONLY WILL PROMOTE THEIR GENERAL WELFARE, BUT ALSO WILL SERVE WELL THE INTERESTS OF EUROPEAN BUSINESS. THEY HAVE LEARNED ONLY RECENTLY WHAT AMERICAN EXPERIENCE HAS TAUGHT SO WELL.

CONCLUSION

IN CONCLUSION, I WISH TO EMPHASIZE ONE THEME. WE, AT THE COMMISSION DO NOT EQUATE WISDOM WITH DOGMA. NOR DO WE BELIEVE THAT PUBLIC APPOINTMENT NECESSARILY BRINGS OMNISCIENCE. AS ADVOCATES OF COMPETITION IN THE COMMERCIAL MARKET PLACE, WE CANNOT CLOSE OUR MINDS OR OUR DOORS ON THE MARKET PLACE OF IDEAS - WHETHER THOSE IDEAS CARRY THORNS OF CRITICISM OR THE FEW ROSES OF PRAISE. AND IN AN OPEN SOCIETY, WE MUST ALL HAVE OPEN MINDS. WE WELCOME YOUR IDEAS. WE ASK YOU TO GIVE SOME CONSIDERATION TO OURS.

OBVIOUSLY, IT IS NOT OUR FUNCTION TO GUARANTEE EITHER PROFITS OR SALVATION. BUT THIS COMMISSION STANDS STRONGLY BESIDE THOSE FIRMS WILLING TO STAKE THEIR FORTUNE AND THEIR HONOR ON THE INEVITABLE TRIUMPH OF FREE ENTERPRISE OVER MONOPOLY AND DECEIT.

TOGETHER, WE SHALL SOLVE OUR MUTUAL PROBLEMS.

1. See Radiant Burners Inc. v American Gas Assoc. (D.C. N.D. Ill. 1962)
General Electric Co. v Kirkpatrick (D.C. E.D. Pa. 1963),
Discussed in BNA, ATRR Nos. 67 and 88.
2. Schenk v United States, 249 U.S. 47, 52 (1919).
3. 51 Cong. Rec. 12218 (1914)
4. 51 Cong. Rec. 12734 (1914)
5. 51 Cong. Rec. 11112 (1914)
6. 51 Cong. Rec. 11116 (1914)
7. 51 Cong. Rec. 12939 (1914)
- 7a. 80 Cong. Rec. 9419 (1936)
8. H.R. Rep. No. 2287, 74th Cong. 2d Sess., pt2, 6 (1936)
9. IBID at 27
10. Hearings before the House Committee on the Judiciary on
Bills to amend the Clayton Act, 74 Cong., 1st Sess 5-6
(1935)
11. 80 Cong. Rec. 7886, 7887 (1936)
12. Rowe, Price Discrimination Under the Robinson-Patman Act,
23 (1962)
13. Austern, Book Review, 76 Harv. L. Rev. 662, 668, (1963)
14. Wallace and Douglas, Antitrust Policies and the New Attack
on the Federal Trade Commission, 19 Univ. Chi. L. Rev. 684,
723 (1952). This article was written as a rebuttal of an
article by William Simon, The Case Against the Federal Trade
Commission, 19 Univ. Chi. L. Rev. 297 (1952)
15. Levy, Corporation Lawyer...Saint or Sinner? The New Role of
the Lawyer in Modern Society. 76 Harv. L. Rev. 430 (1962).
16. First Inaugural Address in James D. Richardson, A Compilation
of the Messages and Papers of the Presidents (309, 311) (1899)
17. Foreign Competition p. 7 (1960)
18. In the Matter of Holland Furnace Co., Docket 6203,
55 FTC 55 (1958).

19. F.T.C. v. National Lead Company, et al 352 U.S. 419 (1957) The court said "...there is read into the order the provision of Sec. 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor".
20. See review by Donald Kanter of The 4A's Exploratory Study of Consumer Judgment of Advertising, The New York Times, Monday April 29, 1963.
21. There is, of course, the quantity limits provision contained in Section 2(a) of the Robinson-Patman Act. However, the Commission's record reveals that this technique was only applied in one instance. The Commission lost the case. F.T.C. v. B. F. Goodrich 134 F. Supp. 39 (D.C. D.C. 1955) aff'd 242 F 2d 31 (D.C. Cir. 1957)
22. U.S. v. E. C. Knight 157 U.S. 1 (1895)
23. The Commission does not have complete records of all mergers. The number cited above is based on mergers recorded from only two sources: Standard Corporation Records and Moody's Industrials.
24. Brown Shoe Co., Inc. v. U.S. 370 U.S. 294 (1962)
25. IBID at 333
26. ID at 343, 344
27. Messages & Papers of the Presidents, Vol. XVI, Bureau of National Literature, Inc., p. 8158.
28. S. Rep. 1326, 62nd Cong., 3d Sess. 13 (1913)
29. F.T.C. Records, Testimony before Commission of Louis D. Brandeis 2, 13. (1915)
30. U. S. v. Morton Salt Co., 338 U.S. 632, 652 (1950)
31. Messages & Papers of the Presidents, Vol. XIV, p. 6648.

32. Moog Industries, Inc. v. Federal Trade Commission
355 U.S. 411, 413 (1958)
33. Monopoly and the Public Interest, Committee on
Monopolies and Mergers, Conservative Political
Centre, London, pp. 6-7.

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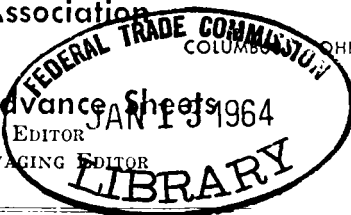
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L XXXVI

September 30, 1963

No. 37

CAN A VIGOROUS FEDERAL TRADE COMMISSION ENFORCEMENT POLICY BE PROFITABLE TO BUSINESS?

By the Hon. A. LEON HIGGINBOTHAM, JR.,
Commissioner of the Federal Trade Commission

I am indeed honored to be
present with you at the annual
winter meeting of the Section In-
stitute on Corporate Legal Prob-
lems.

Delivered by Commissioner H.
Higginbotham before the Ohio State
Bar Association and the Ohio Manu-
facturers Association's Seventy-
fourth Institute on Corporate Legal
Problems, at Arlington Arms
Hotel, Columbus, Ohio, June 26, 1963.

I have heard some critics sug-
gest that the Federal Trade Com-
mission looks askance at small
business. For the record, let
me make it indubitably clear that I
announced you on the merger this
evening of the Ohio State Bar As-
sociation and the Ohio Manufac-
turers Association.

Even under the most stringent
tests, this joint venture brings
together leading representatives of
industry and the corporate

nd SOURCE: Ohio Bar,
Vol. XXXVI, No. 37
September 30, 1963
pp. 983-998

3 A.

do.

Under the Act of March 3, 1879.

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OHIO STATE BAR ASSOCIATION REPORT

uld not violate Section 7 of the Clayton Act. When the top echelons of commerce can share their experiences with leaders of the legal profession, the reasonable probability is that competition will be enhanced, not lessened.

I welcome this opportunity to make a friendly eye-ball to eye-ball contact. Here I can state my personal views, and hopefully the views of my distinguished colleagues, in one meeting where both industrialists and attorneys are present. The attorney-client privilege has been somewhat relaxed by recent court decisions.¹ And thus word has reached Sixth and Pennsylvania, N. W., in Washington, D. C., that some industrialists feel that the Federal Trade Commission is giving the country to certain economic doom. Moreover, I hear that some lawyers, having recently lost a case before the commission, assure their clients that victory was in their grasp but for the ignorances at the Commission. I do not wish to suggest that these comments reflect management of the news. But I am particularly grateful for this opportunity to eliminate the middleman, and to bypass the usual channels of communication. This continuing exchange of views between business and government. While I may never be able to change those views shared by some industrialists or lawyers, I nevertheless welcome the opportunity to try.

Perhaps the caption of my speech is flavored with Madison

Avenue brinkmanship. Perhaps the question "Can a Vigorous Federal Trade Commission Enforcement Policy be Pro-Business?" might imply the subtle use of semantics to make palatable and pleasant an institution which is lethal to your success. Such is not my intent. Let me assure you that I am not turning to the "soft sell."

Pursuant to Section 5, the Federal Trade Commission must prohibit deceptive or misleading advertising. And so that my answer to the question posed in the title of this speech will not be subject to a cease and desist order and possible civil penalties, I hasten to make affirmative disclosures. Perhaps as Justice Holmes once suggested, he who phrases the question and defines the terms controls the answer. As I use the term pro-business, I do not imply that pro-business decisions are necessarily anti-public interest or anti-labor or anti-consumer. To paraphrase the language used by a former industrialist and Secretary of Defense, and to place it in a different context, I respectfully submit that if the Federal Trade Commission makes wise decisions "that which is good for the Federal Trade Commission will be good for the country and that which is good for the Federal Trade Commission should be good for business."

Immediately after announcement of my appointment to the Commission last September, I was barraged by many well meaning individuals who thought it essential that I become instantly familiar with many alleged objective analyses by innumerable persons, whose paramount concern was solely the public interest, the national welfare

1. See *Radiant Burners, Inc., v. American Gas Assoc.* (D. C. N. D. Ill. 1962); *General Electric Co. v. Kirkpatrick* (D. C. E. D. Pa. 1963), Discussed in BNA, ATRR Nos. 67 and 88.

lation proposed . . . strikes directly at the primary interest of the public but denies consumers the assurance of obtaining the benefits of the lowest prices the most efficient methods and equipment can bring about under free, but fair, competition."

Speaking fervently for passage of the statute, Congressman Patman suggested:

The day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. So we have reached the cross roads; we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist . . ."

Congressman Patman concluded that his bill simply would "force all chiselers and cheaters to adopt Golden Rule Policies" and sought only to make "a policy of live and let live, and compel the golden rule in business."

One distinguished commentator on the statute has summarized the history of its passage as follows:

"In the end, the Robinson-Patman compromise of 1936 was the offspring of a mixed marriage between antitrust and NRA, born with a legal split personality."

9. *IBID* at 27.

10. Hearings before the House Committee on the Judiciary on Bills to amend the Clayton Act, 74 Cong., 1st Sess. 5-6 (1935).

11. 80 Cong. Rec. 7886, 7887 (1936).

12. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 23 (1962).

The debate has not subsided since passage of the Robinson-Patman Act. One author still categorizes the statute as one "haphazardly conceived and hopelessly drafted" and laments that "those who unhappily attempt to advise on or to litigate issues under this act are constantly frustrated by the obduracy of the commission in rejecting either logical argument or detailed economic analysis, and by some of the weird results reached by the courts in applying the statute."¹³ A decade ago, in a reply article which they captioned "antitrust policies and the new attack on the federal trade commission" Senator Paul H. Douglas and Robert A. Wallace declared:

"We insist that the [Federal Trade Commission's] enforcement of the laws restraining unfair methods of competition and harmful price discrimination ought not be junked. Rather, we believe that they should be strongly enforced and, where need be, strengthened."

Thus upon my appointment on September 25, 1962, I became the beneficiary of these prolix, allegedly objective polar views on the Federal Trade Commission, and still I have the temerity to be delighted to discuss this issue with you.

In citing these polar views, I neither want nor seek sympathy;

13. Austern, *Book Review*, 76 Harv. L. Rev. 662, 668 (1963).

14. Wallace and Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 Univ. Chi. L. Rev. 684, 723 (1952). This article was written as a rebuttal of an article by William Simon, *The Case Against the Federal Trade Commission*, 19 Univ. Chi. L. Rev. 297 (1952).

I am familiar with the fortitude required of lawyers. As Professor [redacted] emphasizes, "All lawyers are somewhat suspect. A Spanish constador-governor early implored the King of Spain to send no lawyers at all to his new territory: 'they are all devils.' A half-century later Shakespeare in Henry VI made Dick Cade agree to 'kill all lawyers' while Plato had earlier asserted that the lawyer's soul is small and unrighteous."¹⁵

Having previously been involved in civil rights litigation—a field which I've been told still is not really calm today—I early developed the hide of a rhinoceros. I act with calmness and judgment, I learned that one could not verbal darts have lethal affect. As Thomas Jefferson said when our country was in its birth throes, "wise and frugal government is one which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement."¹⁶ The Federal Trade Commission believes in this precept, and if I may point out to this audience—the National Association of Manufacturers agrees. It has stated: "Business men believe in competition because they recognize that the alternative to it is comprehensive government direction which would be far worse in consequences."¹⁷

15. Levy, *Corporation Lawyer . . . Ant or Sinner?* The New Role of the Lawyer in Modern Society. 76 *Harv. L. Rev.* 430 (1962).

16. First Inaugural Address in James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* (2d ed. . . .) (1897).

17. *Federal Trade Commission* p. 7 (1960).

It is obvious that the maintenance of competition contributes to the preservation of democracy and liberty. And it is no accident that those nations which have vigorous competitive economic systems have demonstrated the most immunity to fascism and communism. Specifically then what are the chief benefits of a competitive enterprise system? Economists summarize these benefits in terms of welfare, efficiency and progress. It is said that our system maximizes consumer welfare by gearing production to demand, by providing a variety of products and by the creation of new products. The businessmen of this country have flourished under such a system. Competition makes for efficiency because simple self interest compels us to minimize production costs. This is a conservative technique. And a competitive system is also progressive because it rewards entrepreneurs who develop and utilize technologies for producing better products. The Federal Trade Commission is pro-business because it believes, as you do, in a system making *us* the only criterion for success in the market place.

Obviously our system is not free from fault; but it has maximized consumer welfare; it has produced economic efficiency and technological process. Competition is a delicate flower. And since 1914, the Federal Trade Commission has been tending the garden in which this flower of competition has grown. We have protected the consumer against the arbitrary and capricious exercise of monopolistic power. We have defended smaller firms against the predatory tactics of larger competitors. And we have called to

a halt a variety of unfair and deceptive practices.

Thus, to call the statutes which we administer anti-business is to misconstrue their purpose. Rather than having success determined by flagrant deception or pure monopoly power, the Federal Trade Commission's purpose is to *further* competition, to make each man and each firm stand or fall on the intrinsic worth of its own product.

Although other agencies have antitrust responsibility, the major task is fulfilled by the Federal Trade Commission and the department of justice. Since its enactment in 1914, Section 5 of the Commission's organic act has been at the heart of its efforts to protect the businessman against his mauling competitor.

Section 5 has also been the sinew and the muscle employed by the commission to outlaw restraints of trade. Allow me to give you a few examples. In the Holland Furnace case, salesmen posed as fire inspectors and under these and other guises, induced home owners, by means of scare tactics to purchase heating equipment. Enormous future injury to consumers and competitors was prevented by the Commission's order." In a case which some regard as a classic demonstration of regulatory remedial power, the Commission obtained a strong prohibition against zone delivered pricing by the National Lead Company and others. Once having found the zone delivered pricing system to be the cornerstone of a conspiracy, the commission conditionally banned its use

for five years. Thus when identical prices resulted from the use of zone delivered pricing—such action would be subject to the Commission's order even if all prices were individually derived.¹⁰

Both consumers and competitors are injured when a firm advertises untruthfully that its product cures baldness, tired blood, rheumatism, arthritis, or other ailments. False and misleading representatives also may seriously undermine consumers' confidence in our entire economic system; deception makes a mockery of the basic premise of our system that informed consumer choice ultimately guides the allocation of economic resources.

The advertising world itself seems to sense the need for higher standards. As the shrillness of commercials increase, an immunity seems to set in, and harangues to rush down to the neighborhood grocers or druggists may fall upon closed eyes and deaf ears."

Although Section 5 of the Federal Trade Commission Act gives the Commission broad jurisdiction to prevent "unfair methods of competition" and "unfair or deceptive acts or practices," the Congress by the Clayton Act of 1914 consider-

19. *F. T. C. v. National Lead Company et al*, 352 U. S. 419 (1957). The court said "... there is read into the order the provision of Sec. 2(b) of the Clayton Act as to the right of a seller in good faith to meet the lower price of a competitor."

20. See review by Donald Kanter of *The 4A's Exploratory Study of Consumer Judgment of Advertising*. The New York Times, Monday, April 29, 1963.

18. *In the Matter of Holland Furnace Co.*, Docket 6203, 55 FTC 55 (1958).

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ly supplemented that authority and made it specific.

The Congress declared price discrimination, exclusive dealing, stock acquisitions, and interlocking directorates unlawful whenever there was a reasonable probability that these practices substantially lessened competition. The intent of this legislation was not to establish controls over business; rather, it was intended to improve the competitive mechanism by which business regulates itself.

In this context it is important to note that the Federal Trade Commission is not a regulatory agency in the usual sense. It does not grant licenses to operate, prescribe acceptable prices or rates of return, or engage in any of the other activities associated with some regulatory agencies.

The Federal Trade Commission is concerned primarily with the rules of the game. This approach strives to guarantee that the competitive game is played in a certain way; but it does not call each play in the game nor does it prescribe its outcome. Hence, it is essentially an indirect approach. Most importantly, it does not dictate performance norms for business, e. g., "fair" levels of profits, acceptable rates of technological advance, or the quality and quantity of products to be produced.²¹ When these decisions are

made in a competitive environment, they are best left to individual businessmen.

This is the true genius of vigorous antitrust enforcement. Paradoxically, although an individual businessman may view particular enforcement actions as bothersome and unnecessary meddling into his affairs, such "meddling" protects American businessmen against more direct and continuing interferences into their day-to-day affairs. This is why I say that vigorous antitrust enforcement is really the most pro-business of all public policies.

Let us consider briefly some ways in which the Clayton Act affects the rules of the competition game.

THE PROBLEM OF PRICE DISCRIMINATION

Since its amendment in 1936, Section 2 of the Clayton Act is usually referred to as the Robinson-Patman Act. The purpose of the Act is to insure that competition will not be injured because of discriminatory behavior in the market place.

Charges frequently levelled at the Robinson-Patman Act are that it favors soft rather than hard competition and that it protects competitors rather than competition. But the issues involved are too complex to be answered by such clichés. The soft vs. hard competition argument reminds me of the elephant who shouted, "every man for himself," as he danced among the chickens.

I need not recite to you the facts of economic life. That there are wide disparities in economic power among business enterprises is obvious to everyone familiar with the structure of the American economy. While disparate size is not, per se

21. There is, of course, the quantity limits provision contained in Section 2(a) of the Robinson-Patman Act. However, the Commission's record reveals that this technique was only applied in one instance. The Commission lost the case, *F. T. C. v. B. F. Goodrich*, 134 F. Supp. 39 (D. C. D. C. 1955) aff'd 242 F. 2d 31 (D. C. Cir. 1957).

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legal... per se economically undesirable it may create the opportunities and temptations to use this power in anti-competitive ways. The Robinson-Patman Act was deemed to curb the abuse of such economic power. To implement the slogan, "every man for himself," is to invite the very destruction of the competitive process.

Vigorous and fair enforcement of the Robinson-Patman Act provisions is certainly in the public interest and in the interest of business. In this rapidly growing and changing American economy, vigorous enforcement is in the long-run interest of large business firms as well as small ones. Most firms, regardless of their present circumstances, cannot be certain of their relative position in a given market five or ten years hence. The provisions against price discrimination, direct or indirect, may be irritating today, but most welcome in the future. I feel that much of today's criticism might be muted if more businessmen would consider the possibility that their firm may at some future time have need of the protection afforded by the statute. And above all else, the act is designed to give the small and medium sized businesses of today a fair chance to become the big businesses of tomorrow. The day that small business survives only at the sufferance of firms with vast economic resources, will mark the day competition died in America. This is why vigorous and *judicious* enforcement of the Robinson-Patman Act plays such a central role in preserving our competitive system.

THE MERGER PROHIBITION

In what are sometimes termed "highly concentrated" industries

many persons have argued that the Federal Trade Commission Act and the Clayton Act are merely palliative. They say that suspected malignancy is not susceptible to the prescription "two aspirin before retiring to bed." Call in a skilled surgeon and diagnostician, they urge—one swift of scalpel, one whose steady hands do not tremble after the incision reveals the necessity for divestiture.

For although the Sherman Act of 1890 was intended to curb the growth of business combinations, its passage had little or no effect on the great merger movement that subsequently occurred around the turn of the century. Many of today's business behemoths were put together during this era.

To this day, some industries are concentrated because of failure to curb this first great merger movement. Although the strict interpretation of "commerce" enunciated in 1895²² was subsequently reversed, over 3,200 mergers and consolidations occurred between 1895 and 1905.

The Congress made a second attempt to bar the merger route to market power by the passage of Section 7 of the Clayton Act in 1914. The enforcement of this statute is shared by the Federal Trade Commission and the Department of Justice. But the fact that the statute prohibited stock but not asset acquisitions made it an ineffective weapon against the merger movement of the 1920's. And during that decade over 6,800 mergers occurred.

In 1950 the Congress tried again. It passed the Celler-Kefauver

22. *U. S. v. E. C. Knight*, 157 U. S. 1 (1895).

amendment to Section 7. This law closed the asset loophole in the original Section 7. The new Section 7 makes it unlawful for a corporation engaged in commerce to acquire either the assets or stock of another corporation engaged in commerce where the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. The legislative history of the 1950 amendment makes it clear that Congress not only intended to close the old acquisition of assets loophole, but also wished to stop mergers before they reach Sherman Act proportions.

The fears of some and the hopes of others—that the act would slow merger activity have not been realized. It is ironical that the start of the current merger movement coincides approximately with the passage of the Cellar-Kefauver Act. Although comprehensive statistical evidence is lacking on the current merger movement, the available evidence points to a merger trend of tremendous potential importance for the economy. The Commission's records indicate that over 1,000 manufacturing and mining mergers have occurred since 1950. Should the current merger movement transform further the structure of our economy, it might bring about irreversible changes which could influence its performance for decades to come. From my own experience in private practice, I know

the jet-propelled, head long pace of today's top corporate personnel. During one exhilarating 36-hour day a hypothetical Ohio businessman might close a deal by telephone to New York; negotiate for a factory in Puerto Rico, and settle a labor crisis in California. After that I am sure you would have no difficulty telling your wives that you will be in Karachi, Pakistan, on your 25th wedding anniversary. I only ask you to do one thing for me and for yourselves—while you are at the airport—read the first Supreme Court decision interpreting "new" Section 7. An understanding of the philosophical bases of that decision may keep an already hectic day from becoming a nightmare.

Allow me to summarize briefly the main thrust of that decision involving the Brown Shoe Company.²⁴

Although this merger involved a vertical foreclosure of less than two percent of the retail market, the Court found that it violated the Act. While the shoe industry is still competitive because it is composed of a large number of manufacturers and retailers, the Court reasoned that the "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." Speaking of the horizontal aspect of the case the Court reasoned, "if a merger achieving five percent control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be dif-

23. The Commission does not have complete records of all mergers. The number cited above is based on mergers recorded from only two sources: Standard Corporation Records and Moody's Industrials.

24. *Brown Shoe Co., Inc. v. U. S.*, 370 U. S. 294 (1962).

25. *IBID* at 333.

cult to dissolve the combinations previously approved."²¹

I shall not attempt to go into the any legal and economic nuances merger law, e. g., its application various types of conglomerate mergers, and to joint ventures. Many of these matters are still to be resolved by the commission and the courts. My main point is this. Industrial history has demonstrated that mergers can transform the structure of highly competitive industries with a swiftness that is reversible. Everyone interested in preserving a free economy should take a personal interest in the final outcome of the current merger movement. Each merger, seemingly natural and good when viewed in isolation—may create an industrial mosaic not to your liking.

DIRECT ASSISTANCE TO BUSINESS

The Commission's role as a *regulatory* agency and I emphasize *regulatory*—requires it to do more than issue seemingly Draconian edicts against improper conduct. We also have the obligation of preventive medicine. A substantial amount of our time is devoted to distinguishing between healthy and harmful commercial nutrients for businessmen. We want you to exercise your competitive muscles so that both government and business may assure the continued existence of a healthy and flourishing competition.

President Wilson stated on September 2, 1916, in accepting renomination to the presidency, "We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of com-

merce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law . . . the Trade Commission substitutes counsel and accommodation for the harsher processes of legal restraint. . . ."²²

Once aware of these sign posts, it is hoped that businessmen will avoid the precipice posted "unfair to competition."

To achieve this goal, the Commission within the last year materially broadened the advisory aspect of its activities.

On June 1, 1962, the Commission established a new procedure providing for trade regulation rule proceedings. The rules developed and issued by the Commission may cover all applications of a particular statutory provision or they may be limited to particular industries, products, geographic markets or areas.

Under this new procedure the Commission will promulgate rules which express its experience and judgment based upon its knowledge relating to the substantive requirements of the statutes it administers. Of course, prior to the development and issuance of such rules it would give notice and hold hearings on any proposed rule. Such rules would become effective upon publication in the federal register.

Businessmen have long asserted their willingness to comply with the law. Tell us what it is and we'll obey it, they say. In fact I have heard that some of you have

26. *Id.* at 313, 314.

27. *Messages & Papers of the Presidents*, Vol. XVI, Bureau of National Literature, Inc., p. 8158.

formed out of your attorney's offices muttering that bankruptcy and psychoanalysis were the only choices available to businessmen complying with *all* the laws administered by the commission. Hopefully, the trade regulation rules will remove some of this alleged neurotic uncertainty. Moreover, the Commission's policy also provides for the amendment, suspension or repeal of any such rule where market conditions make it obsolete.

The Federal Trade Commission's Bureau of Industry Guidance has presently under study proposals for trade regulation proceedings which may affect more than a dozen industries. So that we may make informed and intelligent decisions before promulgating these rules, we ask you to give us *your* views. Pursuant to the trade regulation rule procedure adopted last year, the Commission has announced two hearings on proposed rules.

These involve the manufacture and sale of sewing machines and sleeping bags.

Another new and significant innovation has been the commission decision to issue "advisory opinions." While we have had limited experience with this procedure, we believe that it may be one of the more important innovations in recent commission history.

From the very moment of its conception, some of the men who fathered the Federal Trade Commission Act felt—"There ought to be a way in which . . . men . . . could submit their plan to the government and an inquiry made as to the legality of such a transaction, and if the government was of the opinion that competition conditions

would not be substantially impaired, . . . there should be an end of that particular controversy for all time."

Of course, as in everything that the Federal Trade Commission touches, there were opposing views. Some have the Midas touch, but one wave of any wand by the Commission may spark a veritable conflagration of invective. Almost as soon as the Commission put out its sign that it was "open for business," no less an advocate than Louis D. Brandeis took up the cudgels for the opposition.

" . . . from the business standpoint, it is desirable. It would be a very convenient thing if a man could come before your body and say, 'here are the facts; is this right? Can we do this, or can we do that?' It sounds very alluring. I believe it to be absolutely impossible of proper application, and for this commission, I think it would be one of the most dangerous powers that it could possibly assume.

* * *

"So, I believe, that this Commission could not do anything which in its real essence, would be more harmful to business, and more dangerous to the Commission itself, than to exercise this power, if you have it. But I think it is perfectly clear that you have not got it."

Requests for advisory opinions have included questions on the legality of various types of advertising programs, new or different merchandising methods, various types of cooperation among firms, the

28. S. Rep. 1326, 62nd Cong., 3d Sess. 13 (1913).

29. F. T. C. Records, Testimony before Commission of Louis D. Brandeis 2, 13 (1915).

se of common sales agencies and respective mergers. To date the commission has received more than 60 requests for advisory opinions under this new procedure. We are delighted that increasing numbers of American businessmen have decided to obtain our opinion before embarking on some proposed course of action. And, where the Commission has found it at all feasible, a binding opinion has been rendered. Where insufficient information has been provided, or where the proposed course of action is not covered by laws enforced by the Federal Trade Commission, we must refuse to give an opinion. Confidential treatment is accorded to both the request and the opinion.

Here then we have three examples of positive action by the Commission which have as their purpose the provision of direct assistance to American business firms.

THE DEVELOPMENT OF ECONOMIC EXPERTISE

Critics of antitrust enforcement agencies have levied the charge, and rightly so at times, that enforcement usually proceeds on a case-by-case approach without reference to the size, shape or contours of the economic landscape. The Commission is cognizant of the validity of such accusations. Consequently, we favor an active and intelligent program of economic studies to improve our knowledge in many vital areas.

Section 6 of the Federal Trade Commission Act gives the Commission the power "to gather and compile information concerning, and to investigate from time to time the organization, business

conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships." In the words of Mr. Justice Jackson:

"... law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."³⁰

Whether we be a force for good or for evil will be determined by our knowledge. We cannot operate in a vacuum. This theme was articulated by President Theodore Roosevelt, one of the pioneers of trade regulation. In his first annual message, he emphasized the urgent need for more economic facts. As he put it, "the first requisite is knowledge, full and complete..."³¹

Since 1901, the need for reliable knowledge has been magnified. Our industrial edifice has grown vastly more complex. Today, America's largest industrial company has annual sales greater than all the nation's manufacturing concerns in 1899. It is imperative, therefore, that the Commission conduct continuing economic inquiries to keep abreast of the profound changes occurring in our economy. As a banker inquires into the capital, collateral and character of prospective borrowers, so must the Commission be familiar with current developments in the economy before deciding where to allocate

30. *U. S. v. Morton Salt Co.*, 338 U. S. 632, 652 (1950).

31. *Messages & Papers of the Presidents*, Vol. XIV, p. 6648.

its limited resources. To make such decisions without relevant economic facts, may result in misdirected public policy. Thus in the *Moog and Niehoff* cases, the Supreme Court said:

"... the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the commission."³²

Reliable economic understanding and knowledge must be the cornerstone of any legal structure designed to insure the maintenance of a competitive economy. How better can the Commission develop policies and promote practices beneficial to competition and business?

THE FUTURE OF FREE ENTERPRISE IN A TROUBLED WORLD

Never before has so much been asked of our economic system. The customary stresses and strains of a growing industrial economy have been sharpened by the cold war. The stakes are high; but to abandon hope is to lose everything.

Arising out of the warm ashes of World War I, World War II and Korea is more than a military confrontation. In today's struggle, social, economic and political performance are critical. And never before has the junction of our system been subject to closer world wide scrutiny.

One of the truly encouraging de-

velopments of the 1950's was the changed attitude of Western Europe. By permitting and encouraging free enterprise as the motive force of economic progress, Western Europe has done more than embrace free enterprise as a habit of thought or as an ideological alternative to communism; it has recognized that competition must be safeguarded so that free enterprise may be a durable way of economic life.

Western Europe has turned its back on its long history of private cartelization and flirtation with public collectivization. The Common Market countries have written antitrust provisions into the Rome Treaty. They have recognized that private enterprise is not enough; it must also be competitive enterprise.

Of late, the antitrust breeze has also been blowing more strongly over the British Isles, long so proud of their "practical" approach to matters of competition and monopoly—an approach which, in practice, so often seemed less afraid of monopoly than competition. In a remarkably candid treatment of the monopoly problem in Britain, a committee appointed by the British Conservative Party recently recommended an expansion of that country's antitrust activities. This committee concluded:

"Our own view is that the British economy since the war has been suffering not from too much but too little competition. The trouble with British industry today is not that managements are so ruthless in their determination to score over their competitors that any less immediate objectives, values and amenities are forgotten; the risk is rather that both manage-

32. *Moog Industries, Inc., v. Federal Trade Commission*, 355 U. S. 411, 413 (1958).

ment and organized labor should become complacent and, as a result, sluggish and inefficient."

Yes, the free European nations have chosen a competitive economic system in preference to a controlled one. And they have recognized that the flower of competition must not be left unattended. I think their decision to rely on the indirect antitrust approach to preserve competition not only will promote their general welfare, but also will serve well the interests of European business. They have learned only recently what American experience has taught so well.

CONCLUSION

In conclusion, I wish to emphasize one theme. We, at the Commission do not equate wisdom with dogma. Nor do we believe that

public appointment necessarily brings omniscience. As advocates of competition in the commercial market place, we cannot close our minds or our doors on the market place of ideas—whether those ideas carry thorns of criticism or the few roses of praise. And in an open society, we must all have open minds. We welcome your ideas. We ask you to give some consideration to ours.

Obviously, it is not our function to guarantee either profits or salvation. But this Commission stands strongly beside those firms willing to stake their fortune and their honor of the inevitable triumph of free enterprise over monopoly and deceit.

Together, we shall solve our mutual problems.

VARIED PROGRAM SET FOR DISTRICT FIVE MEETING IN MARION OCTOBER 10

"Oil and Gas Law for the Landowner's Lawyer," "Special Verdicts and Interrogatories to Jury," and a special panel on "Minimum and Conflicting Fee Schedules and Law Office Management," "Making Your Own Office Pay" fill the afternoon program October 10 at the meeting of State Bar District Five in Marion.

A special ladies program also is included on the program.

The sessions begin at 1:45 p. m.

33. *Monopoly and the Public Interest*, Committee on Monopolies and Mergers, Conservative Political Centre, London, pp. 6-7.

in the Hotel Harding's Plantation Room. Kenneth Petri of Galion, OSBA Executive Committeeman from the district will preside at the afternoon program.

The oil and gas law topic will be presented by Milton S. Geiger of Alliance. The topic is of particular interest in the area because of recent oil and gas discoveries.

Jack Alton of Columbus will cover the second topic of the program.

The special panel discussion will have Walter Moore of Marion as chairman. Panelists are Arthur Graham of Fostoria, Clifford Calhoun of Mount Gilead, C. Victor